

identify all the high-risk radioactive sources that are being used and have been abandoned." The Secretary told the conference "We are ready to assist other interested countries to speed the needed improvements, and we want to begin immediately."

I am sure his heart was in the right place, but he had no ability to deliver on the statement he made to this conference.

He went on to say:

We are prepared to work with other countries to locate, consolidate, secure, and dispose of high risk radiological sources by developing a system of national regional repositories to consolidate and securely store these sources.

The administration has never requested a penny for this purpose. It seems now that this supplemental appropriations bill is where we should make the Secretary's offer of assistance to the international community credible.

This bill calls for \$20 million for non-proliferation assistance to nations other than the former Soviet Union. The Materials, Protection, Controls, and Accounting Agency nuclear non-proliferation programs to date have only targeted nations of the former Soviet Union. There is no money to do anything about it, to assist countries all over the world, especially in Southeast Asia—no money. Obviously, the point is made there.

We have \$20 million in this bill for funds that are needed to develop the analytical capability to determine the nature and origin of a stolen nuclear weapon or captured improvised nuclear device or what happened and who did it in the event of nuclear detonation on U.S. soil.

We need research and development. If a nuclear device is found, we need to be able to determine what kind of a device it is, how it will detonate, how to defuse it. We have \$20 million, a relatively small amount, the Department needs to improve material and radiochemical analysis methods, the sampling and modeling of nuclear explosion debris, and the implications of nuclear weapons design.

Our weapons labs around this country have the best scientists in the world. I have been to the weapons labs: Livermore, Sandia, Los Alamos. They have the best and the brightest. But they can't do anything to help us unless they have money to do the research. That is what this will do.

In this amendment, we have \$15 million for nuclear nonproliferation verification, \$12 million for non-proliferation assistance to Russian strategic rocket forces. What is this amount? Certain elements of the Russian military prefer to deal with our Department of Energy rather than the Department of Defense. For example, all work by the United States to secure Russian Navy warheads has been done by DOE. The fiscal year 2004 budget proposes for the first time for DOE to assist the Russian strategic rocket force ICBMs to secure its weapons. It contains funds to secure 2 of the first

10 most viable sites. Additional funds in the supplemental would start the program much earlier and increase the number of sites to be protected.

I have worked with Senator DOMENICI for many years, as the ranking member and chairman—going back and forth—of the Energy and Water Subcommittee on Appropriations. We have the responsibility to take care of our nuclear weapons. Large amounts of money are appropriated every year. We in the United States appropriate large sums of money to make sure our nuclear stockpile is safe and reliable. A nuclear stockpile is not like storing a car. It is not like storing canned goods. These weapons have elements that go bad, and you need to constantly review, examine these weapons to find if they are safe and reliable. The Russians know this. But they have not had the resources to help. It is in our best interest to work with them, with Nunn-Lugar and other such methods, to try to help them make their stockpile safe and reliable. Here is \$12 million for additional funds that, as I have indicated, would help the ICBMs in Russia be safe and reliable.

When the war with Iraq ends and we find weapons of mass destruction in with nuclear material, we need to make sure we will have some way of disposing of them. We have provided in this bill for that. We want to make sure there is money for nuclear material detection regarding materials and devices.

Funds are also needed to help develop advanced materials that will enable the fielding of room-temperature, high-resolution, hand-held and portable radiation detection and identification equipment. Our labs can do that with the scientific community, many of which are in the private sector.

We have another problem. We need to be able to detect any nuclear explosion from proliferant countries that have very low yield. We don't have the equipment to do that. We need \$10 million to do that. What we have in this amendment is a number of efforts to simply make our country safer, to make homeland security apply also to things nuclear.

I am going to offer this amendment when we get the parliamentary problem worked out. The threat of loose nukes worldwide scares me as much as anything that I am afraid of. We have to do something about it. We have not talked about it. It is like the perennial ostrich sticking his head underground so he cannot see what is going on. I see what is going on, and the Senate must see what is going on. This bill, which is extremely important—as important as anything we do for homeland security—contains \$400 million, directed totally to things nuclear.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. HAGEL). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. COCHRAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

EXECUTIVE SESSION

MIGUEL A. ESTRADA, OF VIRGINIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

The PRESIDING OFFICER. Under the previous order, the hour of 1:30 p.m. having arrived, the Senate will now go into executive session and resume consideration of Executive Calendar No. 21, which the clerk will report.

The legislative clerk read the nomination of Miguel A. Estrada, of Virginia, to be United States Circuit Judge for the District of Columbia Circuit.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, I understand the distinguished chairman is on his way over. As we have evenly divided time and time is running, I will begin and will yield when he arrives.

We have another in a series of cloture votes on this divisive nomination today. Actually, nothing has changed significantly since the leadership forced the three previous cloture votes.

I did read in the New York Times over the weekend that Mr. Estrada spoke about the memos he wrote as being perhaps somewhat divisive. Maybe that is why the White House does not want us to see them. The only reason we are having these problems is the administration has refused to bring forward the writings on which one could form an idea whether he should have a lifetime appointment to the second highest court in the country.

The White House has had access to all these writings and they eagerly committed the political capital to go forward. But they don't want us to see them. The administration remains insistent that the Senate rubberstamp nominees without fulfilling the Senate's constitutional advise and consent role in this most important process.

Everyone has known for a long time how to solve the impasse in the Miguel Estrada nomination. The Democratic leader's letter pointed the way back in early February. Some say that the administration is proceeding this way because they do not care whether he goes through or not. They think somehow it is a political issue. That is the problem if this administration continues in its efforts to politicize the Federal courts.

There has been too much politicizing. The Federal courts are not a branch that belongs to either the Republican or Democratic party. They are not a branch of whoever is in the White House or in control of the Congress. They are the one independent branch of Government. They are supposed to be above politics, outside of politics, and

yet in this case the White House could easily move forward with this nomination but is choosing to keep it in limbo. Unfortunately, too many Members are willing to dance to that tune.

Remember, it says advise and consent not advise and rubberstamp. The administration and Mr. Estrada do not want to show Members his writings. This is part of the work and experience that made the White House such an eager supporter of him. The American people and their representative ought to know how he thinks and have the best basis to predict how he would act as a judge, whether as an ideologue or as an impartial judge.

Past administrations—and I have been here with President Ford, President Carter, President Reagan, former President Bush, and President Clinton—they have all shown similar type writings to the Senate. We had nominations of Robert Bork, William Rehnquist, Brad Reynold, Ben Civiletti, and others. Even this administration did so for a nominee to the Environmental Protection Agency.

We have had senior members in the Republican Party say they wish the White House would show some cooperation, as past White Houses have, to get forward on this. Instead, we continue being blocked by the administration's position when we should be going forward.

Mr. DURBIN. Will the Senator yield?

Mr. LEAHY. Of course.

Mr. DURBIN. I thank the Senator for his service as ranking Democrat on the Senate Judiciary Committee. I would like to put the Senator from Vermont on the spot with a question.

If the White House will allow these writings that are in controversy here by Miguel Estrada to be released to the Congress for review, and if we are then given a chance to review them, to bring Mr. Estrada for a hearing, if necessary, so we can ask questions, some of which he has not answered completely before, at that point would the Senator from Vermont personally urge the Democrats in committee to allow this process to move forward in an orderly fashion to consideration in committee, to a vote in the committee, and to a vote on the floor?

Mr. LEAHY. I say to my friend from Illinois, of course I would. I have said this right along. I may or may not vote for Mr. Estrada based on what is in the writings, but I will never give a blank check to any President—I have not—Democrat or Republican. I want to know what is in there. After all, there have been statements by this person's supervisor that he did not fairly state the law in the course of his work. We should have the basis to determine the quality of his work.

As the Senator from Illinois knows, when I was chairman of the committee, in 17 months we certainly moved far more of President Bush's nominees than the Republicans did when they were in the chair the previous 17 months for President Clinton. I believe

that we actually moved more than the previous 30-month period under them. I did not allow the secret holds they had used extensively to block President Clinton's nominees. At times, they actually required 100 Senators to be for somebody before they would go through it.

A former Republican leader accepted part of the blame for how the Senate came to this, and I appreciate him doing that. He acknowledged you filibuster a lot of different ways. The Republican majority often defeated nominees by making sure they were never given a hearing or a vote. I don't believe in that.

If a nominee will go through the normal process, if the White House will stop playing games, if they will stop stonewalling, I am perfectly willing to go forward.

Mr. DURBIN. I might say to the Senator from Vermont, if he will yield further, in my experience in trial practice before I was elected to Congress, one's curiosity was always raised when the party on the other side refused to disclose a document. You had to go to court and have a decision made by the judge in discovery as to whether they would be required to produce the document. You naturally believed, if they were holding back a document, then certainly it might be a document that would compromise their position or jeopardize their position.

I would like to ask the Senator from Vermont, is it not a fact now that because of this long delay and because of this intransigence by the White House to release these documents, there is more and more curiosity as to what is contained in them? Here we have a nominee who, despite an excellent academic resume, really has little to show in terms of legal writings or things that give us an insight into why he should be selected for a lifetime appointment to the DC Circuit Court.

I ask the Senator from Vermont, isn't it fairly obvious at this point that, if the White House will release these documents and start the orderly process, then we can have a final disposition of Mr. Estrada, just as soon as they respond?

Mr. LEAHY. I would think so, I say to my friend from Illinois. Again, the point is the White House has had access to these papers. Surely they did a thorough review of this nomination. Surely someone in the administration must know what these documents contain if they are refusing to provide them and Republican Senators are asserting that they are "privileged". I would hope that no one, and certainly no one with legal training, would assert a privilege without knowing whether it applies. My recollection is that the administration took several weeks to respond to our request for the documents. Surely they were not simply ignoring our request for those weeks. I would have assumed they were using that time to review the documents and determine what could be

produced immediately and what might require further discussion. They want to put this young man, at 41 years old, on the second highest court in the land. But they don't want us to know about his legal work and judgment when he was working for the government. They are saying: We'll nominate; you rubberstamp. I am saying it is advice and consent. That has worked in the Constitution for all the history of this country and will continue to work.

We had an example of internal Justice Department documents that were the work on another of the President's controversial nominees that have previously been produced to the Senate. At least the papers came forth. We find that she, working for a previous Republican administration, had strongly organized, in fact, went out of her way to help support a tax exemption for a college that discriminated against African Americans, discriminated against Catholics, discriminated against Mormons, took the most radical position, but was a darling of the Republican Party. Her nomination to a major court of appeals position by this administration is now pending. But at least we knew of her work and at least she could be questioned on it.

I would say to my friend from Illinois that we began this because we were waiting for the distinguished chairman. He is here. I suggest I reserve the remainder of my time and yield to the distinguished chairman as I had agreed when we called off the quorum at the request of the Republican side.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. How much time remains on both sides?

The PRESIDING OFFICER. The Senator from Utah has 15 minutes remaining. The other side has 6 minutes 30 seconds remaining.

Mr. HATCH. Mr. President, this is the first true filibuster in history of a circuit court of appeals nominee—the first one in history. It just has never happened before, no matter how controversial the nominee—and this one certainly is not controversial. They just haven't found anything to criticize him with, and that is the problem.

The distinguished Senator from Vermont says he is not going to rubberstamp anybody. Don't anybody worry about that. The Democrats have not rubberstamped one of these judicial nominations of President Bush so far. In fact, they voted against a high percentage of President Bush's nominees.

Frankly—ask all those who have gone through this process—it is an arduous, difficult, and in many ways a demeaning process as a result of the way my colleagues on the other side seem to be attacking these nominees.

The White House has been accused of political games in putting Miguel Estrada up, and in not allowing fishing expeditions into the most sensitive documents in the Justice Department. Those documents are the appeal, certiorari, and amicus recommendations

made by people such as Mr. Estrada while they are there.

Seven living former Solicitors General have all said there is no way that any administration should give those documents to the Senate. I might add, four of those are Democrats, three of whom were Democratic Solicitors General with whom Miguel Estrada worked and for whom they had great affection. Seth Waxman, who is a great lawyer here in this town and a partisan Democrat, basically said Estrada has every qualification a person should have for the bench and basically said he did a good job while at the Department.

I heard the distinguished Senator from Illinois say he has little to show in legal writings. What about the 15 briefs he has written for the U.S. Supreme Court? That is a lot of legal writings, more than almost any nominee we have had here in the history of my 27 years on the Judiciary Committee. What about all the appeal briefs he has written and the reply briefs he has written, not only on the Supreme Court but in the circuit courts of appeals? They have access to every one of those. What about all the written questions they have given him? Only two asked for them after the hearing, and then we agreed to provide him to answer more written questions, and only one or two have asked further written questions.

There is no desire on the part of my Democratic colleagues to learn more about Miguel Estrada. There is a desire to find something they can hang their hat on to stop him because he is on the fast track to the Supreme Court, they believe. The best way they can show President Bush they are not going to have a conservative Hispanic on the court is by attacking Miguel Estrada, and that is what is behind this matter.

Today we are debating a historic fourth cloture vote on the nomination of Miguel Estrada. No other Executive Calendar nominee, judicial or non-judicial, has ever been subjected to four cloture votes in this body.

Let me state that a clear majority of this body supports this nomination, as has been determined by the past three cloture votes. So it is regrettable that a minority of Senators have followed their script of obstructionism to prevent the Senate from concluding this debate on this nomination and allowing the Senate to proceed to a final vote. However, it is not surprising they have stalled this nomination. In September of last year, a Democratic staffer on the Judiciary Committee is quoted in *The Nation* magazine as saying:

Estrada is 40, and if he makes it to the circuit then he will be Bush's first Supreme Court nominee. He could be on the Supreme Court for 30 years and do a lot of damage. We have to stop him now.

That, by the way, is a Democratic staffer on the Senate side.

Mr. LEAHY. Will the Senator yield? Do you have the name?

Mr. HATCH. I am not going to name names on the floor.

Mr. LEAHY. Is this one of those unnamed sources?

Mr. HATCH. Mr. President, I ask for the regular order.

The PRESIDING OFFICER. The Senator from Utah has the floor.

Mr. HATCH. It appears the real reason for the filibuster—I suggest to the distinguished Senator, just read *The Nation* magazine and you can find out for yourself. Why should I provide information to you anymore?

It appears that the real reason for this filibuster is the threat of a Justice Estrada on the Supreme Court. Of course, I take issue with the assertion that Mr. Estrada would do any so-called damage on any court. In fact, I am confident that he would be a fair and unbiased judge who would follow the law. He would not be an activist, which is probably what this staffer meant when he said that Mr. Estrada would do a lot of damage. But I find it ironic that this staffer knew enough about Miguel Estrada last September to proclaim that he must be stopped at all costs, when some of my Democratic friends insist on continuing this filibuster because they allegedly do not know enough about his views. Read *The Nation* magazine. I think the real reason for this filibuster lies in the rest of the staffer's quote: That Mr. Estrada is a Supreme Court caliber attorney whose ascension to the Federal bench must be stopped now.

This unparalleled filibuster is one of many weapons of obstruction designed to prevent the President from having his nominees fairly considered and voted upon by the Senate. This is according to a partisan game plan, developed and coordinated as early as April 2001, when, according to the *New York Times*, Senate Democrats met in a private retreat to forge a unified party strategy to combat the White House on judicial nominees. I would like them to deny this. I would like them to tell me *The New York Times* misquoted and didn't tell the truth here. They can't deny it. As one participant in the meeting stated, according to that press account, it was "important for the Senate to change the ground rules" on judicial nominations.

One of the three noted liberals who coached Senate Democrats on changing the ground rules on judicial nominations was University of Chicago law professor Cass Sunstein. Just the other day I came across a *Yale Law Review* article that Professor Sunstein co-authored in 1992 entitled *The Senate, the Constitution, and the Confirmation Process*. This article advocates a confirmation process in which the Senate plays a more aggressive and high-profile role. I found surprisingly familiar many of the principles he propounds in that article because I have heard a number of my Democratic colleagues also arguing for their adoption time and again in the Judiciary Committee and on the Senate floor.

For example, Professor Sunstein says:

[T]he criticisms of the current process are telling. Supporters of the administration object that members of the Senate, and private groups generally critical of the Administration, expend enormous energy not in disinterested inquiry but in trying to 'catch' the nominee: to find some statement in her record that reveals a belief so extreme as to be 'out of the mainstream.'

When I read this statement, I thought it sounded familiar, so I took a look at the remarks of my colleague from New York Senator SCHUMER, when he chaired a hearing in June 2001 at which he argued that a judicial nominee's ideology should play a role in the confirmation process.

Sure enough, here is what my good friend said:

[T]his unwillingness to openly examine ideology has sometimes led Senators who oppose a nominee to seek out non-ideological disqualifying factors, like small financial improprieties from long ago, to justify their opposition. This, in turn, has led to an escalating war of "gotcha" politics that, in my judgment, has warped the Senate's confirmation process and harmed the Senate's reputation.

Professor Sunstein also argues that:

[t]he senate should place the burden of proof—with respect to character, excellence, and point of view—on the nominee.

He continues:

In exercising its consent power, the Senate is entitled to reject nominees simply because they have not established that they have the requisite qualities, even if there is considerable uncertainty on that point.

Well, as we all know, after Senator SCHUMER's hearing on ideology in the confirmation process, he held a second hearing arguing Professor Sunstein's precise point: That the burden of proving worthiness for confirmation should be on the nominee. In fact, this is one of the factors sustaining this filibuster: The ill-formed perception that Miguel Estrada has not proven that he deserves to be confirmed to the DC Circuit.

Back to Professor Sunstein. He also says:

The President, his opponents say, chooses 'stealth' nominees whom he has reason to believe are deeply conservative, but whose views the Senate will not be able to uncover.

This, of course, is precisely how Senator SCHUMER characterized Mr. Estrada in *The Nation* magazine last fall. He said:

Estrada is like a Stealth missile—with a nose cone—coming out of the right wing's deepest silo.

I have heard a number of my other Democratic colleagues join in the chorus of labeling Mr. Estrada a stealth nominee.

Mr. President, I think I have made my point. This 1992 article written by Cass Sunstein provided the basis for the model that some of my Democratic colleagues are using to stall up or down votes on President Bush's judicial nominees, including Miguel Estrada. This filibuster is part of a coordinated attack designed to deny President Bush's circuit nominees a seat on the Federal bench.

Don't get me wrong—Professor Sunstein is an unabashedly liberal law professor, and as such it can be argued that he has *carte blanche*, or even an obligation, to push the far-left envelope, which he regularly does. But this does not mean that my Democratic colleagues have an obligation to blindly follow him into the far-left. Some of them have refused to do so, and I commend them for that.

For the others, I will repeat my sentiments which I stated here on the Senate floor just a few weeks ago. This historic cloture vote represents another opportunity for my Democratic colleagues to reverse course. This is the time to end their dangerous obstructionist tactics and grant Mr. Estrada the up or down vote any judicial nominee deserves. They are free to vote against confirming him if they truly believe that he has not answered their questions, or that his record is incomplete without examining the Solicitor General memoranda. But they should not continue to obstruct the will of the majority of this body that desires to give this nominee a vote.

Mr. President, how much time remains on my side?

The PRESIDING OFFICER. The Senator from Utah has 6 minutes 10 seconds.

Mr. HATCH. Mr. President, I reserve the remainder of my time.

Mr. LEAHY. To date, there have been at least 77 editorials and op-eds in support of the position of Democratic Senators on the nominations of Mr. Miguel Estrada's nomination to the Court of the Appeals for D.C. Circuit. On March 6, 2003, I placed in the CONGRESSIONAL RECORD excerpts of the editorials and op-eds that had been published by that date, because Republicans had been asserting that there were only a handful of editorials or op-eds in support of our concerns. Here are some excerpts from 24 additional editorials and op-eds expressing concerns about Mr. Estrada's nomination, bringing the total to at least 77. This controversial nomination continues to divide, rather than to unite, the American people.

I ask unanimous consent to print in the RECORD excerpts of 24 recent editorials or op-eds, in addition to those printed last month.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the New York Times, Mar. 13, 2003]

HOLD FIRM ON ESTRADA

[Supporters] argued that handing over Mr. Estrada's memorandums would be a violation of privacy, although other nominees, including Chief Justice William Rehnquist and Judge Robert Bork, did so in their own confirmation hearings. Supporters have also contended, shamefully, that opposition to Mr. Estrada is anti-Latino, even though his nomination is opposed by the Congressional Hispanic Caucus, the Mexican American Legal Defense and Educational Fund and other leading Latino groups. Now Republicans are attacking Democratic senators for using a filibuster. The criticism rings hollow, given that some Republicans making it,

including the majority leader, Bill Frist, voted to filibuster when President Clinton nominated Richard Paez, a Mexican-American, to an appeals court. Rather than demonizing Democratic senators, the White House should look for common ground. In the case of Mr. Estrada, it should respect the Senate's role in the process by making his full record available. And going forward, it should choose judicial nominees from the ideological mainstream, who do not prompt the sort of bitter partisan divisions that Mr. Estrada has.

[From the Connecticut Law Tribune, Mar. 24, 2003]

NOMINATION BATTLES

Because federal judgeships are for life, what is at stake is what the law of the land will be for the next two or three decades. That's why the continuing Senate filibuster transcends Estrada. Its aim is to use what little Democratic power is left to force the White House and Senate Republicans to the table to hammer out a more bipartisan, more balanced approach to judge-picking.

[From the Daily News, Mar. 31, 2003]

THE QUOTABLE LINCOLN

By President Lincoln's reasoning, Mr. Estrada is not qualified for the court appointment if his opinions are unknown publicly. The full quotation comes to light as the Senate Republicans vow to keep bringing up the Estrada nomination against the opposition of all but a handful of the Democrats. The Republicans, including both Maine senators, have been unable to muster more than 55 of the necessary 60 votes to break the filibuster.

[From the Times Union, Mar. 20, 2003]

ESTRADA SHOULD ANSWER QUESTIONS IN PUBLIC

Since Mr. Estrada doesn't have experience to bolster his candidacy, he must provide convincing evidence of his ability to perform. If he is qualified to serve, he should step up to the plate and tell us, in a public hearing. If not, he should step aside and let the Senate get on with its business.

[From the Orlando Sentinel Tribune, Mar. 23, 2003]

WILL ESTRADA PROTECT THE RIGHTS OF LATINOS?

At his hearing before the Senate, Estrada failed to answer senator's questions, and he hid his views from the Senate and the public. Because of his limited record, it was important for Estrada to be forthcoming and give senators the opportunity to find out more about the kind of judge he would be; yet he chose to remain silent. . . . The little we do know about his record is very troubling. . . . Defeating his nomination would not send the message to Latinos that "only a certain kind of Latino need apply." On the contrary, it would send the message that everyone in America is judged by the same standard. If you cannot be fair and protect the basic constitutional rights of the common person, you do not deserve to serve in a judicial appointment, no matter what your race or ethnicity is.

[From the Connecticut Law Tribune, Mar. 24, 2003]

NOMINATIONS BATTLES

Miguel Estrada is being treated the same way Republicans treated Democratic nominees for years, Hispanic or otherwise. The battle is intense because the stakes are high. At issue is the American principle of checks and balances, and more. Republicans already

control the White House and Congress and are now aiming for the third branch of government. Not only will Bush likely get the chance to push the divided Supreme Court rightward with an appointment or two. He already is reshaping the appeals courts one level below the Supreme Court. Because federal judgeships are for life, what is at stake is what the law of the land will be for the next two or three decades. That's why the continuing Senate filibuster transcends Estrada. Its aim is to use what little Democratic power is left to force the White House and Senate Republicans to the table to hammer out a more bipartisan, more balanced approach to judge-picking.

[From the Troy Record Editorial, Mar. 10, 2003]

SENATE JUDGMENT WISE IN ESTRADA NOMINATION

In reality, a Court of Appeals judgeship is a lifetime appointment. This means that the 39-year-old Estrada could be making decisions from the bench for 30 or 40 years. . . . Democrats on the Committee want to get a feel for how Estrada will rule when the rubber meets the road, and that is certainly fair. Is it out of the question for Estrada to let the committee know the name of a judge he admires? Why wouldn't he name a Supreme Court decision he disagrees with, or approves of? These are not unreasonable questions. . . . The Senate is right not to simply rubber stamp his nomination.

[From the American Prospect, Mar. 17, 2003]

RULE BREAKER: WHEN IT COMES TO HELEN THOMAS, MIGUEL ESTRADA AND ACTS OF WAR, GEORGE W. BUSH ISN'T BIG ON CONVENTION

Then there's the tussle over judicial nominee Miguel Estrada. Bush doesn't like the fact that Democratic senators are filibustering Estrada's nomination. So he suggested changing the rules to "ensure timely up-or-down votes on judicial nominations both now and in the future, no matter who is the president or what party controls the Senate." According to the Senate's Web site, filibusters have been around since the early days of Congress and have been popular since the 1850s. It's hard to remember the last time a president suggested that the Senate change one of its oldest traditions. There have been plenty of presidents who haven't liked congressional rules, but that doesn't mean they've suggested changing them just to accomplish one goal.

[From the Times Herald-Record, Mar. 9, 2003]

HOW TO END THE FILIBUSTER

That's not nearly as bad as the charge by some Republicans that Democrats are opposing Estrada because he's Hispanic and, as a result, Democrats are preventing a group of people from achieving a milestone. Do these people ever listen to themselves? For a host of reasons, including support of immigration and education reform, pro-union and pro-labor policies and a philosophy that embraces affirmative action, the Democratic Party has enjoyed the support of a majority of the nation's growing Hispanic community for some time. In fact, many Hispanic groups oppose Estrada's nomination because they do not think he understands or is sensitive to issues and aspirations that are important to Hispanics in America. . . . It would have been nice, then, had Clinton been able to secure a floor vote for other highly qualified Harvard Law School graduates whose nominations languished and eventually died in the Senate Judiciary Committee, which was controlled by Republicans. . . . The Senate

should not rubber stamp a president who wants to tilt the court heavily to one side.

[From the Dayton Daily News, Mar. 14, 2003]
THERE'S EASY FIX FOR JUDGE HOLDUPS

President Bush has called on the Senate to permanently ban any filibustering over judicial nominations. . . . A president genuinely interested in a judiciary that works won't map a strategy that allows presidents to push through any nominee at will. Doing so allows for, even invites, an ideological judiciary prone to extremes. It undermines merit appointments in favor of lifetime appointments handed out like so many political plums.

[From the Sarasota Herald-Tribune, Mar. 16, 2003]

POWER, NOT ETHNICITY, AT ISSUE

The Republican strategy is to win his approval by charging that opponents are motivated by prejudice. . . . It is also a totally despicable tactic, designed to avoid discussion of the reason most Democrats oppose Estrada. This reason has nothing to do with Estrada's ethnicity or legal ability, but rather the drive by Bush and like-minded Republicans to pack the federal courts from top to bottom with radical rightists. Not, mind you, conservatives interested in preserving our institutions and values but radical activists who want to uproot many of the laws and court decisions of the last 50 years. Estrada would be such a judge. . . . Senators who try to keep that from happening deserve the thanks of the American people, not the calumny heaped on them by a president who last week showed his lack of understanding of the roles of the separate branches of government by pressuring the Senate to change its rules for debate and allow a one-vote majority to ramrod presidential appointments through the Senate."

[From the Copley News Service, Mar. 20, 2003]

WISE WORDS FOR THE SENATE

Republicans like to blame Democratic stalling for judicial vacancies. But that starts the book in the middle. The early chapters, which the GOP ignores, deal with Republican inaction on Clinton's nominees.

[From the Capital Times, Mar. 11, 2003]
BLOCKING A BAD CHOICE

The White House has stonewalled the request for the papers and has refused to allow Estrada to participate in a public hearing where he could be asked further questions. Those hardball tactics have upset even moderate and conservative members who might be inclined to support Estrada. Daschle and the Democrats are right on this one. Unless Estrada and the White House are willing to cooperate with the confirmation process, the Senate need not consider this nomination.

[From the Reno Gazette Journal, Mar. 11, 2003]

YOUR TURN: JUDICIAL CANDIDATE SHOULD ANSWER QUESTIONS

When asked his views on civil rights, women's rights, environmental protections, workers' rights, Mr. Estrada said he had no views. When asked which Supreme Court justice he would emulate, Mr. Estrada said he couldn't answer. The service promoting Mr. Estrada—the White House—surely asked these questions before nominating him. To be sure, they got the answers Other nominees have asked similar questions. They are provided the same type of documents. . . . Would you hire him for the job? Would you hire him if you couldn't fire him? Of course not.

[From the Orlando Sentinel, Mar. 16, 2003]
SENATE NEEDS MORE INFORMATION ON ESTRADA

[T]he issue we are debating, the relative roles of the executive and legislative, is not a trivial issue. It goes to the heart, as John Adams said, of the stability of government, because it goes to the independence of the judiciary. . . . I believe we are being called to resist an effort to inappropriately utilize executive power and to exclude the legislative role in the appointment of federal judges.

[From the San Antonio Express, Mar. 13, 2003]

AN OK FOR ESTRADA WON'T HELP NATION

We should expect more than a federal judicial nominee, and we should not set a precedent that would allow future presidents and nominees to act without regard for the Senate's role in a system of checks and balances.

[From the Chattanooga Times/Chattanooga Free Press, Mar. 12, 2003]

THE CASE AGAINST ESTRADA

Senate Democrats are hanging tough against President Bush's nomination of Miguel Estrada for a federal appellate judgeship. Wish them well. They are doing righteous work. The Constitution obliges the Senate to advise and consent on judicial appointments. This is the advise part and, no, this meltdown does not have anything to do with who is pro- or anti-Hispanic, as Republicans are charging in a campaign that is cynical even by Washington standards. There is a very serious issue at the core of this dispute—nothing less than the fundamental nature of the federal judiciary—and the attempt to defame opposition to Estrada as anti-Hispanic prejudice is absurd on its face.

[From the Sarasota Herald-Tribune, Mar. 16, 2003]

POWER, NOT ETHNICITY, AT ISSUE

The Republican strategy is to win his approval by charging that opponents are motivated by prejudice. This is a powerful weapon in states with heavy Mexican or Cuban populations. It is also a totally despicable tactic, designed to avoid discussion of the reason most Democrats oppose Estrada. This reason has nothing to do with Estrada's ethnicity or legal ability, but rather the drive by Bush and like-minded Republicans to pack the federal courts from top to bottom with radical rightists. Not, mind you, conservatives interested in preserving our institutions and values but radical activists who want to uproot many of the laws and court decisions of the last 50 years. Estrada would be such a judge. At least that is a fair assumption based on the record of the Senate committee hearing on his confirmation. He wasn't willing to offer his views on many of the most pertinent and controversial constitutional questions of concern to courts, Congress and the public. He declined to make available memoranda he wrote for the office of solicitor general when he worked there. The solicitor general has provided such documents in other confirmation hearings, including those of Rehnquist, Bork and Esterbrook.

[From the New Republic, Apr. 7, 2003]
PRIVATE OPINION

One reason Senate Democrats haven't been swayed by these arguments is that they're really not true: Democratic researchers have unearthed records from at least five judicial-confirmation hearings in which government legal memoranda were delivered to the Senate. Their favorite example is the Justice Department's release of memos during Rob-

ert Bork's 1987 confirmation battle, written by a lawyer in the solicitor general's office who held precisely the same job as Estrada.

[From the Chicago Sun Times, Mar. 14, 2003]
IF ESTRADA THINKS THAT BEING LATINO IS ENOUGH TO GET HIM CONFIRMED, HE'S IN FOR A RUDE AWAKENING

Bush obviously wants to score political points with Latino voters Latinos deserve and demand better. Estrada may be well-qualified, but so are other Latinos whose legal writings are not being guarded as if they were state secrets. Bush may be able to get Congress to pass a bill without allowing it to be read first, but the Senate should not abdicate its constitutional obligation to give its advice and consent on these lifetime appointees. Bush's political stock is sinking, and Latino political stock is rising. The way I see it, Bush needs us more than we need him. So Bush should nominate someone most Latinos can live with, be proud of and support, or no one at all. Time is on our side. Bush doesn't get it: Not just any Latino judge will do.

[From the Copley News Service, Mar. 6, 2003]
THE DECISION OF A LIFETIME

Miguel Estrada, along with the White House and Republican Senate leadership, would do well to take notice. They complain that the Democrats seek too much information as their price for putting Estrada's nomination to a vote. . . . Under White House coaching, perhaps, Estrada proved strangely tight-lipped. Inasmuch as he has not served a previous judgeship, there was no "paper trail" by which to gauge the man's legal philosophy.

[From the Houston Chronicle, Mar. 16, 2003]
OH, NO, IDEOLOGICAL JUDGES; SAY IT ISN'T SO
Estrada is bright and far right. Just how far right is a question that the Bush administration doesn't want to answer. The White House is refusing to let senators see memos Estrada wrote while working in the solicitor general's office and that would shed plenty of light on the issue. Instead, Republicans are offering a second Estrada appearance before the Judiciary Committee. Judging by Estrada's lock-jawed performance last September, it would be a gigantic waste of time (which, of course, the White House knows). There is a common theme in Estrada's and Owen's attempts to get on the circuit court bench. It involves, to put it mildly, evasion and equivocation.

[From the Ventura County Star, Mar. 16, 2003]

WHAT DO WE KNOW ABOUT JUDICIAL NOMINEE?

Judges are supposed to be able to look at attorney's arguments with impartiality and determine which side has a stronger case within the letter and spirit of the law. To be effective and just, the judiciary must be neither liberal nor conservative. The judiciary must be independent, concerned only with the integrity of law. That's a high ideal and, of course, nearly impossible to reach, but it's what we should be reaching for. The fact is we have no idea if Mr. Estrada is capable of impartiality, and he's not willing to discuss it.

[From the Houston Chronicle, Mar. 7, 2003]
YAKETY, YAK—KEEP TALKING SENATORS

So undemocratic, wail the Republicans desperate to get on with a vote on the nomination of Miguel Estrada to the U.S. Circuit Court of Appeals for the District of Columbia before anyone can find out how right-wing the former Justice Department official

might actually be. Some of these Republicans are the same people—and are certainly of the same party—who over the years have attempted to talk to death many bills and nominations.

Additionally, here is an excerpt of an additional news article that is noteworthy for its assessment of the refusal of the White House to release the documents requested, despite the precedent and despite the interest of some Republican Senators in doing so:

[From the Weekly Standard, Mar. 17, 2003]

FILIBUSTER SI, ESTRADA NO!

The White House refused . . . access to Estrada's working papers. Period. This adamant posture, in the eyes of some in Senate GOP leadership circles, handcuffed Frist. "There's some frustration," said a top GOP leadership aide. "From the very beginning we told them that was the only way out and a face-saver for everyone. But it came down to the fact that no one on the White House or Justice team wanted to walk into the Oval Office and say to the president, 'You might have to give up these memos.'" The administration's position on the memos reflects its deeply held ethic of aggressively defending executive branch prerogatives. Though the White House has never characterized the Estrada matter as one of executive privilege . . . it falls into the broad category of executive branch muscularity. And while most Republicans generally support this posture, some Bush allies on and off Capitol Hill have come to question the administration's fastidiousness in the Estrada fight.

In addition, there have been dozens and dozens and dozens of letters to the editor published in opposition to editorials supporting the Republican position on this nomination. Here is just one sample of those many letters from citizens across the country:

[From the Washington Post, Mar. 20, 2003]

BEHIND THE ESTRADA FILIBUSTER

The depth of Mr. Estrada's sentiments on issues facing the federal courts seems to be known only to the far-right members of the legal community who support him and to the Bush administration. The question is whether the Senate, which has an equal say in whether Mr. Estrada will sit on the U.S. Court of Appeals for the D.C. Circuit, has an equal right to the information, including Justice Department memorandums, that is available to the administration. It is far from extortionate that senators not be forced to vote without the information the administration holds.

The PRESIDING OFFICER. Who yields time?

The Senator from Vermont.

Mr. LEAHY. Mr. President, I try to keep a straight face when I hear my good friend, the distinguished Senator from Utah, speaking, but it is hard. He has been able to master the ability to look stern and self-righteous, as he has throughout a recitation of the revisionist history here.

The question of precedent? The Republicans joined the filibusters of Stephen Breyer to the First Circuit, Judge Rosemary Barkett to the Eleventh Circuit, Judge H. Lee Sarokin to the Third Circuit, Judge Richard Paez to the Ninth Circuit, and Judge Marsha Berzon to the Ninth Circuit. We had to have cloture votes on all but one of these and on several others.

But as the former Republican leader admitted—and I commend him for this—they did not have to go to filibusters on most of these because they never brought them up at all. They never had a hearing on them. They never had a vote on them in committee or anywhere else. In effect, they had a filibuster of one. If any one Republican Senator objected to any one of President Clinton's nominees, or just a few, the caucus would make the determination they would never get a hearing. The distinguished chairman at that time would not give them a hearing. They would not get a vote. It was only if the caucus decided that they would be allowed to go forward would they even get a vote.

So it begs credulity to hear this kind of sophistry on the Senate floor and the nature of a "filibuster" being constantly redefined. They would not allow them to come to a vote at all.

During the 17 months when we controlled the Senate Judiciary Committee, we confirmed 100 of President Bush's nominees. We had hearings on 103. We voted down 2. We confirmed 100. There was no similar period of time when President Clinton was in office and the Republicans were in control that they passed anywhere near as many judges for President Clinton.

I wonder if I could have order just for the sake of precedent.

The PRESIDING OFFICER. The Senate will be in order.

The Senator from Vermont.

Mr. LEAHY. We moved them through. And we got rid of the anonymous holds. We got rid of the secret holds. I will explain in greater detail.

Mr. President, the Republican leadership in the Senate has chosen today for another in a series of cloture votes on this divisive nomination. Nothing has significantly changed since it forced the three previous cloture votes. The administration's obstinacy continues to impede progress to resolve this matter. The administration remains intent on packing the Federal circuit courts and on insisting that the Senate rubber stamp its nominees without fulfilling the Senate's constitutional advise and consent role in this most important process. The White House could have long ago helped solve the impasse on the Estrada nomination by honoring the Senate's role in the appointment process and providing the Senate with access to Mr. Estrada's legal work. Past administrations have provided such legal memoranda in connection with the nominations of Robert Bork, William Rehnquist, Brad Reynolds, Stephen Trott and Ben Civiletti, and even this administration did so with a nominee to the Environmental Protection Agency. In my statement in connection with the last cloture vote I outlined additional precedent for sharing the requested materials with the Senate as did Senator KENNEDY.

We have the statement of Attorney General Robert H. Jackson, who later became one of our finest Supreme

Court Justices, when he wrote an Attorney General Opinion in 1941 acknowledging that among the occasions when exceptions should be made and Executive department files would be produced to the Congress would be confirmations. As Attorney General Jackson noted:

Of course, where the public interest has seemed to justify it, information as to particular situations has been supplied to congressional committees by me and by former Attorneys General. For example, I have taken the position that committees called upon to pass on the confirmation of persons recommended for appointment by the Attorney General would be afforded confidential access to any information that we have—because no candidate's name is submitted without his knowledge and the Department does not intend to submit the name of any person whose entire history will not stand light.

I mentioned the additional example of similar materials that were provided to Congress in 1982 by the Reagan administration when the Senate Finance Committee held a hearing to consider legislation to deny federal tax-exempt status to private schools practicing racial discrimination. A number of Justice Department memoranda, as well as communications between high-level officials, were turned over by the Reagan administration to the Senate Finance Committee in connection with the hearing, just months after the documents were first written. The issues at that hearing reveal that some of the documents turned over were much more sensitive than those requested of Mr. Estrada, but they were still provided to Congress by the Reagan administration.

The documents turned over to the Senate included:

Letters from Representative TRENT LOTT to Secretary Regan, IRS Commissioner Egger, and Solicitor General Lee, urging change in the administration's position on Bob Jones; memorandum from Associate Deputy Attorney General Bruce Fein to Deputy Attorney General Edward Schmults, advising Schmults on private schools; memorandum from Carolyn Kuhl, Special Assistant to the Attorney General, to Ken Starr, noting Reagan/Bush campaign statements on private schools; memorandum from Peter Wallison, Treasury General Counsel, to Secretary Regan briefing him on meeting with Representative LOTT; memorandum from Treasury General Counsel Wallison to Deputy Secretary McNamar and Secretary Regan on Government's position in Bob Jones case; memorandum from Civil Rights Division Head, William Bradford Reynolds, to Attorney General Smith justifying changes in administration's position on Bob Jones; memorandum from Treasury Assistant Secretary for Public Affairs, Ann McLaughlin, to Deputy Secretary McNamar on "press strategy" for releasing Bob Jones decision; memorandum from IRS Chief Counsel Gideon to Treasury Deputy General Counsel Government's statement in

Bob Jones; letter from IRS Chief Counsel Gideon to Civil Rights Division Head Reynolds on formulation of Government's statement in Bob Jones; and memorandum from Assistant Attorney General Theodore Olson, Office of Legal Counsel, to Attorney General Smith and Deputy Attorney General Schmults responding to the analysis in Reynolds' memo on Bob Jones.

In 1982, the Republican administration at that time released to the Senate documents that included internal memoranda among high-level Justice Department officials, inter-agency communications, and documents relating to the government's position in an important Supreme Court case. They also included letters to the Solicitor General.

Moreover, the Reagan administration turned over these documents within months after being written, and no harm was done to the workings of the Justice Department or the administration. The Bush administration is claiming that it is unprecedented to turn over such documents—and that the release of documents written by Mr. Estrada 6 to 10 years earlier would irreparably harm the government. I urge the administration and Republican Senators to consider this additional precedent.

I also noted how in 2001, this White House agreed to give access to memoranda written by Jeffrey Holmstead, nominated to be an Assistant Administrator of the Environmental Protection Agency. The Senate Committee on Environment and Public Works requested memoranda from Holmstead's years of service in the White House counsel's office under former President Bush. In particular, the Committee was interested in materials related to Holmstead's handling of an amendment to the Clean Air Act and other environmental issues. In the summer of 2001, the Bush administration resolved an impasse with the Committee over the nomination by permitting Committee staffers to review memoranda that Holmstead wrote while in the White House counsel's office. In sum, the administration allowed access to documents from the White House counsel's office—a more sensitive post than the one Mr. Estrada held when he was in the Department of Justice.

So, despite this administration's continued insistence on confidentiality, it has turned over, allowed access or worked to reach an accommodation on access to documents similar to those requested in connection with the Estrada nomination in other cases and for other committees. In the matter of the Estrada nomination, the question before the Senate concerns a lifetime appointment to the second-highest court in the land.

The former Republican leader accepted "part of the blame" for how the Senate has come to consider judicial nominations. I appreciate that because it is one of the few times a Republican Senator has accepted responsibility for

what happened during the years in which the Republican majority in the Senate blocked and delayed so many of President Clinton's judicial nominees. The Senator from Mississippi also acknowledged that "you filibuster a lot of different ways." I thank the Senator from Mississippi for trying to be constructive and for suggesting that "something can be worked out" on the request for Mr. Estrada's work papers from the Department of Justice.

A recent edition of *The Weekly Standard*, a report suggests that other Senate Republicans, "several veteran GOP Senate staffers" and "a top GOP leadership aide" asked the White House to show some flexibility and to share the legal memoranda with the Senate to resolve this matter, but they were rebuffed. It is regrettable that the White House will not listen to reason from Senate Democrats or Senate Republicans. If they had, there would be no need for this cloture vote. The White House is less interested in making progress on the Estrada nomination than in trying to score political points and to divide the Hispanic community.

The real "double standard" here is that the President selected Mr. Estrada based in large part on his work for four and a half years in the Solicitor General's Office as well as for his ideological views, but the Administration says that the Senate may not examine his written work from the office that would shed the most light on his views. The White House says that the Senate should not consider the very ideology the White House took into account in selecting a 41-year-old for a lifetime seat on the country's second-highest court. Another double standard at work here is that this is a nominee who is well known for having very passionate views about judicial decisions and legal policy and is well known for being outspoken, and yet he has refused to share his views with the very people charged with evaluating his nomination. It seems to be a perversion of the constitutional process to require the Senate to stumble in the dark about his views, when he shares his views quite freely with others and when this Administration has selected him for the privilege of this high office, and for life, based on those views.

Just this past weekend, a story in *The New York Times* reported that during his nomination hearing which I scheduled and Senator SCHUMER chaired last September, "Mr. Estrada took what is often called 'the judicial fifth,' declining to answer many questions by saying that he could not comment on issues that might come before him should he be confirmed." The report correctly continued: "It is a common approach for judicial nominees, but Mr. Estrada was more reticent than most." The report also notes that: "Mr. Estrada gave a hint that what the memorandums might disclose was his impatient manner when he told the committee he might have harshly dis-

missed some arguments by junior lawyers." Our review of the requested documents would end the mystery and speculation.

One of the most disconcerting aspects of the manner in which the Senate is approaching these divisive judicial nominations is what appears to be the Republican majority's willingness to sacrifice the constitutional authority of the Senate as a check on the power of the President in the area of lifetime appointments to our federal courts. It should concern all of us and the American people that the Republican majority's efforts to re-write Senate history in order to rubber stamp this White House's federal judicial nominees will cause long-term damage to this institution, to our courts, to our constitutional form of government, to the rights and protections of the American people and to generations to come.

Republicans are now willing to breach the 24-year-old rule of the Judiciary Committee that had always protected the right of the minority to debate a matter. Republicans have now established a double standard with respect to the opposition of home-state Senators. If the opposition to a judicial nominee is that of a Republican home State Senator to a nominee of a Democratic President, it is honored and no hearing may go forward. But if the opposition is to a judicial nominee of a Republican President by a Democratic home State Senator, well that is too bad and the Republican majority does not choose to defer or care or honor that objection.

The White House is using ideology to select its judicial nominees but is trying to prevent the Senate from knowing the ideology of these nominees when it evaluates them. It was not so long ago when then-Senator Ashcroft was chairing a series of Judiciary Committee hearings at which Edwin Meese III testified:

I think that very extensive investigations of each nominee—and I don't worry about the delay that this might cause because, remember, those judges are going to be on the bench for their professional lifetime, so they have got plenty of time ahead once they are confirmed, and there is very little opportunity to pull them out of those benches once they have been confirmed—I think a careful investigation of the background of each judge, including their writings, if they have previously been judges or in public positions, the actions that they have taken, the decisions that they have written, so that we can to the extent possible eliminate people who would turn out to be activist judges from being confirmed.

Timothy E. Flanigan, an official from the administration of the President's father, and who more recently served as Deputy White House Counsel, helping the current President select his judicial nominees, testified strongly in favor of "the need for the Judiciary Committee and the full Senate to be extraordinarily diligent in examining the judicial philosophy of potential nominees." He continued:

In evaluating judicial nominees, the Senate has often been stymied by its inability to obtain evidence of a nominee's judicial philosophy. In the absence of such evidence, the Senate has often confirmed a nominee on the theory that it could find no fault with the nominee.

I would reverse the presumption and place the burden squarely on the shoulders of the judicial nominee to prove that he or she has a well-thought-out judicial philosophy, one that recognizes the limited role for Federal judges. Such a burden is appropriately borne by one seeking life tenure to wield the awesome judicial power of the United States.

Now that the occupant of the White House no longer is a popularly-elected Democrat but a Republican, these principles seem no longer to have any support within the White House or the Senate Republican majority. Fortunately, our constitutional principles and our Senate traditions, practices and governing rules do not change with the political party that occupies the White House or with a shift in majority in the Senate.

The White House, in conjunction with the new Republican majority in the Senate, is purposeful in choosing these battles over judicial nominations. Dividing rather than uniting has become their *modus operandi*. The decision by the Republican Senate majority to focus on controversial nominations says much about their mistaken priorities. The Republican majority sets the agenda and they schedule the debate, just as they have again here today.

I have served in the Senate for 29 years, and until recently I have never seen such stridency on the part of an administration or such willingness on the part of a Senate majority to cast aside tradition and upset the balances embedded in our Constitution, in order to expand presidential power. What I find unprecedented are the excesses that the Republican majority and this White House are willing to indulge to override the constitutional division of power over appointments and long-standing Senate practices and history. It strikes me that some Republicans seem to think that they are writing on a blank slate and that they have been given a blank check to pack the courts.

They show a disturbing penchant for reading the Constitution to suit their purposes of the moment rather than as it has functioned for more than 200 years to protect all Americans through its checks and balances.

The Democratic Leader pointed the way out of this impasse again in his letter to the President on February 11. It is regrettable that the President did not respond to that reasonable effort to resolve this matter. Indeed, the letter he sent last week to Senator FRIST was not a response to Senator DASCHLE's reasonable and realistic approach, but a further effort to minimize the Senate's role in this process by proposing radical changes in Senate rules and practices to the great benefit of this Administration.

A distinguished senior Republican Senator saw the reasonableness of the

suggestions that the Democratic leader and assistant leader have consistently made during this debate when he agreed on February 14 that they pointed the way out of the impasse. Regrettably, his efforts and judgment were also rejected by the administration.

The Supreme Court, in an opinion authored last year by none other than Justice Scalia, one of this President's judicial role models, instructs that judicial ethics do not prevent candidates for judicial office or judicial nominees from sharing their judicial philosophy and views.

With respect to "precedent," Republicans not only joined in the filibuster of the nomination of Abe Fortas to be Chief Justice of the United States Supreme Court, they joined in the filibuster of Stephen Breyer to the First Circuit, Judge Rosemary Barkett to the Eleventh Circuit, Judge H. Lee Sarokin to the Third Circuit, and Judge Richard Paez and Judge Marsha Berzon to the Ninth Circuit. The truth is that filibusters on nominations and legislative matters and extended debate on judicial nominations, including circuit court nominations, have become more and more common through Republicans' own actions.

Of course, when they are in the majority Republicans have more successfully defeated nominees by refusing to proceed on them and have not publicly explained their actions, preferring to act in secret under the cloak of anonymity. From 1995 through 2001, when Republicans previously controlled the Senate majority, Republican efforts to defeat President Clinton's judicial nominees most often took place through inaction and anonymous holds for which no Republican Senator could be held accountable. In effect, these were anonymous "filibusters."

Republicans held up almost 80 judicial nominees who were not acted upon during the Congress in which President Clinton first nominated them, and they eventually defeated more than 50 judicial nominees without a recorded Senate vote of any kind, just by refusing to proceed with hearings and committee votes.

Beyond judicial nominees, Republicans also filibustered the nomination of executive branch nominees. They successfully filibustered the nomination of Dr. Henry Foster to become Surgeon General of the United States in spite of two cloture votes in 1995. Dr. David Satcher's subsequent nomination to be Surgeon General also required cloture but he was successfully confirmed.

Other executive branch nominees who were filibustered by Republicans include Walter Dellinger's nomination to be Assistant Attorney General, and two cloture petitions were required to be filed and both were rejected by Republicans. In this case we were able finally to obtain a confirmation vote after an elaborate effort, and Mr. Dellinger was confirmed to that position with 34 votes against him. He was

never confirmed to his position as Solicitor General because Republicans had made clear their opposition to him. In addition, in 1993, Republicans objected to a number of State Department nominations and even the nomination of Janet Napolitano to serve as the U.S. Attorney for Arizona, resulting in cloture petitions.

In 1994, Republicans successfully filibustered the nomination of Sam Brown to be an Ambassador. After three cloture petitions were filed, his nomination was returned to President Clinton without Senate action. Also in 1994, two cloture petitions were required to get a vote on the nomination of Derek Shearer to be an Ambassador. And it likewise took two cloture petitions to get a vote on the nomination of Ricki Tigert to chair the FDIC. So when Republican Senators now talk about the Senate Executive Calendar and presidential nominees, they must be reminded that they recently filibustered many, many qualified nominees.

Nonetheless, in spite of all the intransigence of the White House and all of the doublespeak by some of our colleagues on the other side of the aisle, I can report that the Senate has moved forward to confirm 115 of President Bush's judicial nominations since July 2001. That total includes 15 judges confirmed so far this year, including two controversial nominees to the circuit courts.

Those observing these matters might contrast this progress with the start of the 106th Congress in which the Republican majority in the Senate was delaying consideration of President Clinton's judicial nominees. In 1999, the first hearing on a judicial nominee was not until mid-June. The Senate did not reach 15 confirmations until September of that year. Accordingly, the facts show that Democratic Senators are being extraordinarily cooperative with a Senate majority and a White House that refuses to cooperate with us. We have made progress in spite of that lack of comity and cooperation.

We worked hard to reduce federal judicial vacancies to the lowest level it has been in more than seven years. That is an extremely low vacancy number based on recent history and well below the 67 vacancies that Senator HATCH termed "full employment" on the federal bench during the Clinton administration.

It is unfortunate that the White House and some Republicans have insisted on this confrontation rather than working with us to provide the needed information so that we could proceed to an up-or-down vote. Some on the Republican side seem to prefer political game playing, seeking to pack our courts with ideologues and leveling baseless charges of bigotry, rather than to work with us to resolve the impasse over this nomination by providing information and proceeding to a fair vote.

I was disappointed that Senator BENNETT's straightforward colloquy with

Senator REID and me on February 14, which pointed to a solution, was never allowed by hard-liners on the other side to yield results. I am disappointed that all my efforts and those of Senator DASCHLE and Senator REID have been rejected by the White House. The letter that Senator DASCHLE sent to the President on February 11 pointed the way to resolving this matter reasonably and fairly. Republicans would apparently rather engage in politics.

Republican talking points will undoubtedly claim that this is "unprecedented". They will ignore their own recent filibusters against President Clinton's executive and judicial nominees in so doing. The only thing unprecedented about this matter is that the administration and Republican leadership have shown no willingness to be reasonable and accommodate Democratic Senators' request for information traditionally shared with the Senate by past administrations. That this is the fourth cloture vote on this matter is an indictment of Republican intransigence on this matter, nothing more. What is unprecedented is that there has been no effort on the Republican side to work this matter out as these matters have always been worked out in the past. What is unprecedented is the Republican insistence to schedule cloture vote after cloture vote without first resolving the underlying problem caused by the administration's inflexibility.

I urge the White House and Senate Republicans to end the political warfare and join with us in good faith to make sure the information that is needed to review this nomination is provided so that the Senate may conclude its consideration of this nomination. I urge the White House, as I have for more than two years, to work with us and, quoting from a recent column by Thomas Mann of The Brookings Institute, to submit "a more balanced ticket of judicial nominees and engag[e] in genuine negotiations and compromise with both parties in Congress."

The President promised to be a uniter not a divider, but he has continued to send us judicial nominees that divide our nation and, in this case, he has even managed to divide Hispanics across the country. The nomination and confirmation process begins with the President, and I urge him to work with us to find a way forward to unite, instead of divide, the nation on these issues.

Mr. President, does the Senator from Massachusetts wish the remainder of my time?

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, I thank my friend from Vermont for making very plain for the record and to the American people exactly what has happened over the last period of time. As he has pointed out, there have been more than 100 judges who have been recommended by President Bush, many

of them pro-life, which have been favorably considered by this body.

It was not the Members on this side who have changed the rules. The fact is, it has been this administration's attempt to shape the Federal judiciary. And as the constitutional debates showed so clearly, there was to be a balance.

Initially, during the Constitutional Convention, the Senate of the United States was to be the sole namer of Federal judges. It was only at the end that that was to be a shared responsibility.

There are some who just want us to rubberstamp whatever the President recommends. We do not believe that is what our Founding Fathers intended us to do, as bearing responsibility for the Federal judiciary.

The fact remains, this nominee is known only to the administration, but not to the Judiciary Committee or the American people. They know how he stands. They have understandings of all of his positions. But the Judiciary Committee and the American people do not. That is what is being asked of now.

There have been other times in our history where we have had nominees who did not respond to questions, but they had written documents, and they had articles, speeches, and other decisions that reflected their judicial philosophy. This does not exist here. This is a unique, special situation. And the Senator from Vermont has stated time in and time out over the course of the debate the reasons for it. He should be supported on it. I stand with him. I stand with the institution, the Senate, that says to be able to exercise our responsibility in advice and consent, we ought to be exercising balanced judgment based on the views of the nominee and his views of the Constitution of the United States. We have not received his views on it. And he refused to give it. Nor do we understand from past writings, statements, or other positions what his views are. And the American people are entitled to it.

Mr. President, we must be very clear about what is at stake in this debate over the nomination of Miguel Estrada to the second highest court in the land. Confirming Mr. Estrada to the DC Circuit would give a major victory to the Republican drive to pack the Federal courts with judges who are hostile to civil rights, workers' rights, and many other basic guarantees that define the rights and liberties of all our citizens.

Confirming him would also deal a blow to the Senate's advice and consent role in the selection of federal judges. This role is among the most important of the checks and balances that make our government work. It has ensured that whoever is in the White House cannot use their short term in power to pack the courts by giving lifetime appointments to judges who will decide cases for years in a biased way.

As we all know, the debates at the constitutional convention make clear

that the Senate has a very important role in the selection of judges. In fact, the power initially was to rest solely with the Senate. Although now the power to nominate rests with the President, it is clear that the Senate's advice and consent role is a substantive role, and a critical role. As Alexander Hamilton said in *Federalist* No. 77:

If by influencing the President meant restraining him, this is precisely what must have been intended.

The role of the Senate is vital to ensuring a strong and independent judiciary that will protect citizens' rights. When Republicans try to force the Senate to confirm Mr. Estrada without any significant information about him, they are attacking the role of the Senate and undermining this important constitutional provision.

Despite a growing and disturbing trend during this administration, of giving the Senate less and less information about judges, the Senate has made clear our position that we need this information to fulfill our constitutional role. We have had many nominees who were not particularly forthcoming in their committee hearing about their views on certain topics. But we typically had a large written record to help us understand those nominees' approach to judging. Often, the Senate attempted in good faith to accommodate the President and review the record as it was given to us. In other cases, if a nominee had only very little record to examine, we could rely on their answers at their hearing to give meaningful advice and consent.

Mr. Estrada represents the extreme of this trend. At his hearing, he was silent on important issues that would help us determine what kind of judge he would be. He does not have a written record to review. The one thing that would help us is the body of work by Mr. Estrada at the Justice Department. But the White House will not turn these documents over, despite the fact that they have turned over similar documents for other nominees in the past.

Confirming Miguel Estrada on this record would not only undermine the Senate's important advice and consent role, it would also threaten the rights of millions of Americans who are affected by the judges of the DC Circuit.

Unless we preserve this important role, the independence of the Federal courts will be lost. And it is this independence of the judicial branch from the executive and legislative branches that gives the Federal courts an indispensable role in protecting and upholding the basic rights guaranteed by the Constitution.

In defending the role of the Senate in confirming judicial nominees, we are also protecting the role of the Federal courts in our constitutional form of government. It is our responsibility to defend both of these important aspects of our democracy, and we intend to continue to do so. I urge my colleagues to vote against cloture today.

Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. HATCH. Mr. President, how much time remains?

The PRESIDING OFFICER. The Senator from Utah has 6 minutes 7 seconds.

Mr. HATCH. Mr. President, how much time remains on the other side?

The PRESIDING OFFICER. The other side has 1 minute 22 seconds.

The Senator from Utah.

Mr. HATCH. Mr. President, I think the Senator is correct to say that opponents have a right to feel the way they do, but they do not have a right constitutionally to filibuster a judicial nominee, in my opinion. And they can vote against this nominee if they want to. If they feel that deeply about their points of view, they ought to vote against the nominee, but they should not use some phony fishing expedition request, knowing that no administration can give up these documents because they are the most privileged documents in the Justice Department. And the former Democrat Solicitors General who are alive say that.

I talked to the current Solicitor General, and he said there is no way they can give those documents up. It would ruin the work of the people's attorney, the Solicitor General. And they know that. So that is just a phony excuse to be able to try and stop this nominee.

By the way, with regard to what the distinguished Senator from Vermont said—he brought up that certain nominees Stephen Breyer, Rosemary Barkett, Richard Paez, and Marsha Berzon were filibustered. Not one of them was filibustered. He brought up they were not confirmed, but they were all confirmed. There has never been a judicial nominee to the circuit court of appeals in this country stopped by a filibuster—never—until this one. And, as far as I am concerned, this one is not going to be stopped either, if we do what is right.

And, of course, a cloture vote does not always signify a filibuster. A lot of these cloture votes we have had in the past—that is why I talk in terms of true filibusters versus time management devices used by the majority leader, whoever that may be. In some cases, our own majority leader moved for cloture. So don't give me the argument that this is not the first filibuster. This is the first filibuster, first true filibuster of a circuit court of appeals nominee in history.

Now, no Republican has claimed that Lavenski Smith or Julia Smith Gibbons were filibustered, but both of these Bush circuit nominees were subjected to cloture votes last year. So that is just a phony argument.

Now, they have so much information on this man there is little or no excuse for not proceeding to a vote. The problem is, they cannot find anything wrong with him. There is so much that is right about Miguel Estrada. And I

just cannot quite see some of the arguments that have been given.

Mr. President, how much time is left?

The PRESIDING OFFICER. The Senator has 3 minutes 30 seconds.

Mr. HATCH. Mr. President, I would like to be interrupted at the end of 1 minute so I can give 2 minutes to the distinguished Senator from Pennsylvania.

Let me say something about the memoranda that my Democratic colleagues demand the White House release. These are appeal, certiorari, and amicus recommendations that Mr. Estrada authored while a career lawyer at the Justice Department. Let's be clear on that.

I keep hearing my Democratic colleagues say there is all this precedent for the release of documents by the White House. Well, of course, the White House releases documents to the Senate every day. But they are not appeal, certiorari, and amicus recommendations, and there is absolutely no precedent for the large-scale fishing expedition they seek on Mr. Estrada—not any.

I agree with the seven former living Solicitors General, four of whom are Democrats, who say that the White House is right not to release Mr. Estrada's memoranda.

The PRESIDING OFFICER. The Senator from Utah has 2 minutes 30 seconds remaining.

Mr. HATCH. Mr. President, I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I thank the chairman for yielding time to me.

When you strip this argument down, it boils down to an effort by the other side of the aisle to rewrite the advice and consent clause of the Constitution. For more than 200 years, the President has had discretion in the nomination of Federal judges. And unless there is some reason not to confirm them, they then are confirmed.

Miguel Estrada has an extraordinary record, Phi Beta Kappa, Columbia; magna cum laude, magna at Harvard, Harvard Law Review, 15 cases in the Supreme Court. The issue of wanting to see some of his writings is a red herring. The issue of wanting further amplification of his views on the Constitution is another red herring. This is simply an effort, when 41 Members from the other side of the aisle decide to oppose cloture, to continue this filibuster.

It is my view that we are not going to resolve this matter until we have a real, live, honest to goodness filibuster, and that where the other side of the aisle has to talk. We haven't had one since 1987. The American people do not know what is going on inside the beltway and are likely not to find out until this issue is raised in the conscious level of the American people. Then I think we will find more than four Members of the other side of the aisle

joining 51 on this side of the aisle to invoke cloture and to confirm this worthy nominee.

I do believe there is going to have to be some dramatic action taken so that Americans understand the travesty going on in the Senate Chamber today.

I thank the Chair and yield the floor.

The PRESIDING OFFICER (Mrs. DOLE). The Senator from Vermont.

Mr. LEAHY. Madam President, as my statement indicated, the Senate did have filibusters on Judge Stephen Breyer, Judge Rosemary Barkett, Judge H. Lee Sarokin, Judge Richard Paez, and Judge Marsha Berzon, contrary to the implication of my good friend from Utah.

I actually have sympathy for my friend from Utah. He has been put in an untenable position. He is seeking to uphold an unreasonable position taken by the White House. The White House is trying to tell the Senate what to do. He is being a good soldier and I commend him for that.

The fact is, if the Senate was allowed to be the Senate and make its own decisions and not let the White House dictate what to do, this matter would have been settled a long time ago. We would have followed the tradition and logic set forth by former Supreme Court Justice Robert Jackson when he was Attorney General. He indicated that such material should be provided to the Senate. He wrote:

... I have taken the position that committees called upon to pass on the confirmation of persons recommended for appointment by the Attorney General would be afforded confidential access to any information that we have—because no candidate's name is submitted without his knowledge and the Department does not intend to submit the name of any person whose entire history will not stand light.

The White House has access to Mr. Estrada's papers. It is hard to believe that they have not reviewed these papers. They are part of the information that the administration has about one of its nominees. All previous administrations followed the path of working with the Senate and making sure that the entire history of the person would stand the light of scrutiny. This administration does not want us to know.

The PRESIDING OFFICER. The assistant Democratic leader.

Mr. REID. Madam President, Secretary Rumsfeld will be here at 2:30. I spoke briefly to the manager of the bill, Senator STEVENS. He indicated to me he would have no problem with a recess. I checked with our leader. He said he would have no problem with it either. During this break, the two leaders will have to determine whether there is going to be a recess for Secretary Rumsfeld. I wanted to say this to alert Members that there may be a break after this vote to go listen to the Secretary.

The PRESIDING OFFICER. All time is yielded back.

Under the previous order, the clerk will report the motion to invoke cloture.

The senior assistant bill clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Executive Calendar No. 21, the nomination of Miguel A. Estrada to be United States Circuit Judge for the District of Columbia Circuit:

Bill Frist, Orrin G. Hatch, John Ensign, Sam Brownback, Jim Inhofe, Michael B. Enzi, Wayne Allard, Michael Crapo, Susan M. Collins, Robert F. Bennett, Pete V. Domenici, Conrad R. Burns, Kay Bailey Hutchison, John E. Sununu, Norm Coleman, Charles E. Grassley.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the nomination of Miguel A. Estrada, of Virginia, to be United States Circuit Judge for the District of Columbia Circuit, shall be brought to a close.

The yeas and nays are required under the rule.

The clerk will call the roll.

The legislative clerk called the roll.

Mr. REID. I announce that the Senator from Massachusetts (Mr. KERRY) is necessary absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "no."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 55, nays 44, as follows:

(Rollcall Vote No. 114 Ex.)

YEAS—55

Alexander	Dole	Murkowski
Allard	Domenici	Nelson (FL)
Allen	Ensign	Nelson (NE)
Bennett	Enzi	Nickles
Bond	Fitzgerald	Roberts
Breaux	Frist	Santorum
Brownback	Graham (SC)	Sessions
Bunning	Grassley	Shelby
Burns	Gregg	Smith
Campbell	Hagel	Snowe
Chafee	Hatch	Specter
Chambliss	Hutchison	Stevens
Cochran	Inhofe	Sununu
Coleman	Kyl	Talent
Collins	Lott	Thomas
Cornyn	Lugar	Thomas
Craig	McCain	Voinovich
Crapo	McConnell	Warner
DeWine	Miller	

NAYS—44

Akaka	Dorgan	Leahy
Baucus	Durbin	Levin
Bayh	Edwards	Lieberman
Biden	Feingold	Lincoln
Bingaman	Feinstein	Mikulski
Boxer	Graham (FL)	Murray
Byrd	Harkin	Pryor
Cantwell	Hollings	Reed
Carper	Inouye	Reid
Clinton	Jeffords	Rockefeller
Conrad	Johnson	Sarbanes
Corzine	Kennedy	Schumer
Daschle	Kohl	Stabenow
Dayton	Landrieu	Wyden
Dodd	Lautenberg	

NOT VOTING—1

Kerry

The PRESIDING OFFICER. On this vote, the yeas are 55, the nays are 44. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will now return to legislative session.

Mr. REID. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. ROCKEFELLER. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

SUPPLEMENTAL APPROPRIATIONS ACT TO SUPPORT DEPARTMENT OF DEFENSE OPERATIONS IN IRAQ FOR FISCAL YEAR 2003—Continued

The PRESIDING OFFICER. The Senator from Alaska.

Mr. STEVENS. Madam President, is the pending business the Durbin amendment to the Stevens amendment?

The PRESIDING OFFICER. The Senator is correct, that is the pending question.

Mr. STEVENS. Madam President, I am pleased to yield to the Senator from Illinois. I believe we have reached an agreement on this amendment, and I would be glad to have him modify his amendment if he wishes to do so.

The PRESIDING OFFICER. The Senator from Illinois.

AMENDMENT NO. 437 TO AMENDMENT NO. 436, WITHDRAWN

Mr. DURBIN. Madam President, I withdraw my amendment.

The PRESIDING OFFICER. The Senator has that right.

Mr. DURBIN. I ask unanimous consent to withdraw my second-degree amendment.

The PRESIDING OFFICER. Without objection, it is so ordered. The amendment is withdrawn.

AMENDMENT NO. 436, AS MODIFIED

Mr. DURBIN. Madam President, I thank the Senator from Alaska. I particularly thank the Senator from Virginia, Mr. WARNER, who has acted as good counsel to both the Senator from Alaska and the Senator from Illinois.

Let me tell my colleagues what this amendment does because I think the Senate can be proud of the outcome. What we are going to do is to increase combat pay for the men and women in uniform by 50 percent from \$150 a month to \$225 a month, and we are going to increase the family separation allowance by 150 percent from \$100 month to \$250 a month. Our action in this fiscal year will be retroactive to October 1. So it covers the entire fiscal year. It is going to mean a helping hand through a difficult time for the men and women in uniform, and their families.

As I have said, and I am sure the Senator from Alaska will agree, there is no amount of money that we can give

these men and women, nor their families, to compensate them for what they are giving to our country, but this effort on the Senate floor, in a bipartisan fashion, shows we are dedicated to work together to express our gratitude not just in speeches but by giving a helping hand to these families who are struggling.

I send a modification of the amendment to the desk on behalf of myself, Senators STEVENS, INOUE, WARNER, CHAMBLISS, MIKULSKI, DOLE, DASCHLE, LANDRIEU, CLINTON, and PRYOR.

Mr. STEVENS. Madam President, I now ask that this be deemed the original amendment before the Senate, that it be the Stevens-Durbin amendment, plus any other Senators who wish to add their name to it.

The PRESIDING OFFICER. Without objection, it is so ordered. The amendment is so modified.

Mr. STEVENS. I ask that the Senate cast a unanimous vote in support of this raise of combat pay and family allowances for our men and women who are in harm's way.

The PRESIDING OFFICER. Is there further debate on the amendment?

If not, the question is on agreeing to amendment No. 436, as modified.

The amendment (No. 436), as modified, was agreed to, as follows:

In the amendment strike after the first word and insert the following:

(a) INCREASE IN IMMINENT DANGER SPECIAL PAY.—Section 310(a) of title 37, United States Code is amended by striking "S150" and inserting "S225".

(b) INCREASE IN FAMILY SEPARATION ALLOWANCE.—Section 427(a)(1) of title 37, United States code, is amended by striking "S100" and inserting "S250".

(c) EXPIRATION.—(1) The amendments made by subsections (a) and (b) shall expire on September 30, 2003.

(2) Effective on September 30, 2003, sections 310(a) of title 37, United States Code, and 427(a)(1) of title 37, United States Code, as in effect on the day before the date of the enactment of this Act are hereby revived.

(d) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall take effect on Oct. 1, 2002 and shall apply with respect to months beginning on or after that date.

Mr. DURBIN. Madam President, I move to reconsider the vote.

Mr. REID. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. STEVENS. Madam President, I would like to make sure we show this was a unanimous vote. Beyond that, I have a letter I received from the Boeing Company which is relevant to what we have just done, because some of the people who are covered by this amendment are men and women of the National Guard and Reserve. The Boeing Company has notified me it has 2,000 valued employees who serve our Nation in the military as members of the National Guard and Reserve. They state:

Over the last 3 years, some 950 men and women have proudly stepped forward for differing periods of military duty in support of the September 11-related operation. To date,